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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SISKIYOU

OCT - 6 2000

BY Endorsed - T. Blackwell
DEPUTY CLERK

7 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
8 **IN AND FOR THE COUNTY OF SISKIYOU**

9
10 **THE PEOPLE OF THE STATE**)
OF CALIFORNIA,)
11 **Plaintiff,**)
12 **vs.**)
13 **DOUGLAS TAYLOR COLE, MARBLE**)
MOUNTAIN RANCH,)
14 **and Does 1 - 50,**)
15 **Defendants.**)

Case Number: **SC CV CV '00 - 1700**

**COMPLAINT FOR INJUNCTION,
COMPLIANCE ORDER, CIVIL
PENALTIES, AND OTHER RELIEF.**

16
17
18 Plaintiff, the People of the State of California, by and through Peter F. Knoll, District
19 Attorney of the County of Siskiyou, State of California, is informed and thereon alleges:

20
21 **VENUE AND JURISDICTION**

22 1. PETER F. KNOLL, District Attorney of the County of Siskiyou, acting to protect the
23 public resources, brings this action in the public interest in the name of THE PEOPLE OF THE
24 STATE OF CALIFORNIA, at the request of the California Department of Fish and Game,
25 pursuant to Fish and Game Code Sections 5650.1 and 1603 and Business and Professions Code
26 Section 17200.

1 defendants by such fictitious names. Plaintiff will amend this Complaint to show their true
2 names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges
3 that each of the DOE defendants is legally responsible in some manner for the events and
4 happenings alleged in this Complaint.

5 9. Plaintiff is informed and believes that the actions of Defendant are in violation of the
6 laws and public policy of the State of California and the County of Siskiyou and are inimical to
7 the rights and interests of the general public. When, in this Complaint, reference is made to any
8 act of the Defendants, such allegations shall be deemed to mean that the officers, directors,
9 agents, employees, or representatives of said Defendants did, or authorized such acts, or failed to
10 adequately or properly supervise, control or direct their employees and agents while engaged in
11 the management, direction, operation, or control of the affairs of said business organization, and
12 did so while acting in the scope of their employment or agency.

13 10. Plaintiff is informed and believes that at any and all times relevant hereto, each and
14 every Defendant was acting as the agent or employee of each and every other Defendant.

15 11. Any reference to any act of Defendant RANCH, Defendant COLE, and Defendants
16 Does 1 through 50, inclusive, or Defendants, meant that the act was done by Defendants, and
17 each of them. All Defendants referenced in this Complaint are referenced hereinafter collectively
18 as Defendant.

19 20 FACTUAL BASIS

21 12. The Stanshaw Creek and its tributaries referenced herein are located within the
22 County of Siskiyou, State of California.

23 13. The Stanshaw Creek and its tributaries are "waters" of the State as that term is used
24 in Section 5650 of the Fish and Game Code.

25 14. The Stanshaw Creek and its tributaries referenced herein are each a "stream" as that
26 term is used in Section 1603 of the Fish and Game Code.

27 15. Tributaries to Stanshaw Creek are located in part on the property immediately
28 adjacent to or on property owned, controlled and/or managed by Defendant in the County of

1 Siskiyou, State of California. Pollution to these waters of the State caused by siltation or other
2 runoff would cause damage to these State waters and affect the wildlife population.

3 16. Stanshaw Creek is a tributary to the Klamath River and thence to the Pacific Ocean.
4 Is a known spawning habitat for trout, salmon, coho, and countless other migratory fish and
5 wildlife.

6 17. On or about January 21, 1999 Ranch, and Cole entered into a Streambed Alteration
7 Agreement (SAA) with the Department of Fish and Game pursuant to Section 1603 of the Fish
8 and Game Code for a project to divert water from Stanshaw Creek for power and to provide
9 domestic water for cabins that are rented to recreational visitors, and a commercial guide
10 business. The Agreement (exhibit A) requires, on page 4, that "[a]n adequate fish passage
11 facility shall be incorporated into any barrier that obstructs fish passage."

12 18. Said Streambed Alteration Agreement was for the economic benefit of Defendant
13 Cole, and Marble Mountain Ranch.

14 19. Plaintiff is informed and believes that in September and October 2000 Defendant has
15 not only failed to construct adequate fish passage facilities, but he has so completely blocked the
16 stream as to prevent any fish whatsoever from proceeding upstream from his obstruction in
17 complete violation of the Streambed Alteration Agreement.

18 20. To date, the obstruction remains in an important fish producing stream prevent fish
19 from migrating upstream for spawning purposes. This obstruction is taking place at the time of
20 year when fish migration is the most important.

21 21. In and between September 2000 and October 2000 Defendant substantially diverted
22 or obstructed the natural flow of tributaries to Stanshaw Creek and substantially changed the bed,
23 channel or bank of tributaries to Stanshaw Creek without first notifying the Department of Fish
24 and Game and contrary to or outside the scope of the Streambed Alteration Agreement and
25 Amendment thereto.

26 22. In or between September 2000 and October 2000, Defendant deposited in, permitted
27 to pass into, or placed where it can pass into tributaries to the Stanshaw Creek substances or
28 material deleterious to fish, plant life, or bird life without first obtaining express authorization

1 pursuant to the requirements of Section 5650(b) of the Fish and Game Code.

2 **FIRST CAUSE OF ACTION**

3 **VIOLATION OF FISH AND GAME CODE SECTION 1603(a)**

4 (Unlawful Diversion/Obstruction of Streams or Substantial Change of Bed, Channel or Bank)

5 23. All preceding paragraphs and allegations are re-alleged as if fully set forth herein.

6 24. Between and including September 2000 and October 2000, Defendant commenced,
7 conducted or continued activities that substantially diverted or obstructed the natural flow or
8 substantially changed the bed, channel or bank of tributaries to the Stanshaw Creek

9 To wit:

10 a. On or about September 3, 2000, defendant Cole placed a diversion in Stanshaw Creek
11 which so completely blocked the creek as to prevent any fish at all from passing
12 upstream. Trout and fry as well as coho and salmon were found in stream below the
13 diversion ditch. Stanshaw Creek is a known salmon and coho spawning stream and a
14 spawning tributary to the Klamath River.

15 b. On or about September 3, 2000, defendant Cole was personally notified of the illegal
16 stream diversion / obstruction and told to remove same. As of October 1, 2000,
17 defendant has failed and refused and continues to fail and refuse to remove the
18 obstruction.

19 c. Defendant has failed and refused, and continues to fail and refuse to construct
20 adequate fish passage facilities at the site of the diversion.

21 25. Such activities were outside the scope, or contrary to the requirements, of the
22 Streambed Alteration Agreement.

23 26. Defendant conducted the above-referenced activities without first notifying the
24 Department of Fish and Game and contrary to the requirements of Cole's and Marble
25 MOUNTAIN's Streambed Alteration Agreement.

26 27. Section 1603(a) of the Fish and Game Code provides that "[it] is unlawful for any
27 person to substantially divert or obstruct the natural flow or substantially change the bed,
28 channel, or bank of any river, stream, or lake designated by the department, or use any material

1 from the streambeds, without first notifying the department of that activity, except when the
2 department has been notified pursuant to Section 1601.”

3 28. California Code of Regulations, Title 14, Section 720 designates all rivers, streams,
4 and lakes in the State of California, including all rivers, streams, and streambeds which may have
5 intermittent flows of water for purposes of Section 1603 of the Fish and Game Code.

6 29. Section 1603.1 of the Fish and Game Code provides for injunctive relief and civil
7 penalties of not more than \$25,000 for each such violation of Section 1603 of the Fish and Game
8 Code. Such Penalty is in addition to any other civil penalty imposed by law.

9 30. Plaintiff is informed and believes, and on such information and belief, alleges that
10 Defendant conducted such activities on tributaries to the Stanshaw Creek in violation of Section
11 1603 of the Fish and Game Code.

12 SECOND CAUSE OF ACTION

13 VIOLATION OF FISH AND GAME CODE SECTION 5650

14 (Unlawful to Place Where it May Pass into the Waters of this State,
15 Any Material Deleterious to Fish, Plant or Bird Life)

16 31. All preceding paragraphs and allegations are re-alleged as if fully set forth herein.

17 32. At all times mentioned in this Complaint, Defendant constructed, used, operated or
18 maintained a ranching and farming operation known as Marble Mountain Ranch in the County of
19 Siskiyou, State of California.

20 33. Defendant unlawfully placed substances deleterious to fish, plant or bird life where it
21 could pass into the waters of the State of California, or allowed substances deleterious to fish,
22 plant or bird life to pass into the waters of the State of California in violation of Section
23 5650(a)(6) of the Fish and Game Code. Said violations include the following:

24 a. On or about September 2, 2000, defendant constructed a rock barrier in Stanshaw
25 Creek which inadequate causes the release of additional sedimentation into Stanshaw
26 Creek, and so blocks the flow of that creek as to deplete the flow of the stream to the
27 point erosion and sediment controls are ineffective thus exposing earthen soil and
28

1 destabilizing slopes to the creek causing additional erosion into Stanshaw Creek.

2 34. The unlawful conduct and acts of the Defendant, as described above, demonstrate the
3 necessity and legal basis for the imposition of civil penalties and injunctive relief pursuant to
4 Section 5650.1 of the Fish and Game Code.

5 35. Fish and Game Code Section 5650.1 provides that every person who violates Section
6 5650 is subject to a civil penalty of not more than \$25,000 for each violation. In addition, Fish
7 and Game Code Section 5650.1 provides authority for this Court to issue a permanent injunction
8 in order to restrain conduct without a showing that irreparable damage will occur if the injunction
9 is not issued or that a legal remedy is inadequate.

10 **THIRD CAUSE OF ACTION**

11 **VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200**

12 (Unlawful Business Practice)

13 36. All preceding paragraphs and allegation are re-alleged as if fully set forth herein.

14 37. On and between September 2, 2000 and October 6, 2000, Defendant engaged in
15 conduct constituting unfair competition within the meaning of Section 17200 of the Business and
16 Professions Code, which, in part, defines unfair competition as any unlawful, unfair or fraudulent
17 business act or practice. Defendant's acts of unfair competition include, but are not
18 limited to the following:

19 a. Violations of Section 1603 of the Fish and Game Code as previously alleged in this
20 Complaint and incorporated herein by this reference as if set forth in full herein and is re-
21 alleged as unlawful business acts and practices.

22 b. Violations of Section 5650 of the Fish and Game Code as previously alleged in this
23 Complaint and incorporated herein by this reference as if set forth in full herein and is re-
24 alleged as unlawful business acts and practices.

25 c. Violations of Section 5901 of the Fish and Game Code by placing a device that
26 impedes the passage of fish in Stanshaw Creek.

27 44. The unlawful conduct and acts of Defendant in violation of the law, as described
28 above, demonstrate the necessity and legal basis for the imposition of civil penalties and

1 injunctive relief pursuant to section 17200 of the Business and Professions Code.

2 45. Section 17200 of the Business and Professions Code provides as follows: "17200.
3 Definition. As used in this chapter, unfair competition shall mean and include any unlawful,
4 unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading
5 advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of
6 Division 7 of the Business and Professions Code."

7 46. Section 17206(a) of the Business and Professions Code provides as follows:
8 "17206(a). Any person who engages, has engaged, or proposes to engage in unfair competition
9 shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for
10 each violation...."

11 47. Section 17203 of the Business and Professions Code states: "Any person who
12 engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court
13 of competent jurisdiction. The court may make such orders or judgments, including the
14 appointment of a receiver, as may be necessary to prevent the use or employment by any person
15 of any practice which constitutes unfair competition, as defined in this chapter,...."

16
17 **WHEREFORE, Plaintiff prays for judgment as follows:**

18 1. That pursuant to Section 5650.1 of the Fish and Game Code, Defendant be ordered to
19 pay a civil penalty of Twenty-Five Thousand Dollars (\$25,000) for each and every separate
20 violation according to proof.

21 2. That Defendant, and Defendant's officers, directors, successors, members, agents,
22 representatives, employees, and all persons who act under, by, through, on behalf of, or in
23 concert with Defendant, or any item, with actual or constructive notice of any injunction or
24 restraining order issued in this matter, be permanently restrained and enjoined from doing any of
25 the following acts, directly or indirectly:

26 a. Depositing in or permitting to pass into, or placing where it can pass into, the waters of
27 this State, any substance deleterious to fish, plant, and bird life, or other substance listed
28 in Section 5650 of the Fish and Game Code, in violation of Fish and Game Code Section

1 5650.

2 b. Substantially diverting or obstructing the natural flow of any stream, river or lake,
3 substantially changing the bank, channel or bed of any stream, river or lake, or using any
4 materials from streambeds without first notifying the Department of Fish and Game in
5 accordance with all applicable requirements of the Fish and Game Code.

6 3. That Defendant be required to comply with existing Streambed Alteration
7 Agreement(s) and take all necessary action to correct and mitigate the damage caused by
8 Defendant's actions as alleged in this Complaint.

9 4. That pursuant to Section 17206 of the Business and Professions Code, Defendant be
10 ordered to pay a civil penalty in the amount of Two Thousand Five Hundred Dollars (\$2,500) for
11 each and every separate violation of Section 17200 of the Business and Professions Code
12 perpetrated by Defendant.

13 5. That appropriate injunctive relief issue pursuant to Section 17203 of the Business and
14 Professions Code, including provisions enjoining and restraining Defendant, and each of them,
15 and their agents, servants, employees, partners, associates, officers, representatives and all
16 persons acting in concert with them, with actual or constructive notice of any injunction or
17 restraining order issued in this matter, from engaging in acts of unfair competition in violation of
18 Section 17200 of the Business and Professions Code, including, but not limited to, the practices
19 set forth in preceding paragraphs in this Complaint.

20 6. That Plaintiff recover its costs of suit herein, including costs of investigation, pursuant
21 to Section 17536 of the Business and Professions Code.

22 7. That the Court require Defendant to provide restitution to all government agencies that
23 have expended resources in responding to, cleaning up, and investigating Defendant's violations
24 of law.

25 8. That Plaintiff recover all costs incurred in this action.

26 9. For such other and further relief as the nature of the case may require, and the court
27 deems proper, to fully and successfully dissipate the effects of the violation(s) of Fish and Game
28 Code Section 1603 and 5650, and Business and Professions Code Section 17200, as well as any

1 other relief that the court may deem just and proper.

2 **NOTICE:** This complaint is deemed verified pursuant to the Code of Civil Procedure section
3 446.

4 DATED: October 6, 2000.

5 Respectfully submitted,

6 PETER F. KNOLL
7 DISTRICT ATTORNEY

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9
10 *Lawrence R. Allen*

11

LAWRENCE R. ALLEN
12 Deputy District Attorney

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99-0040

Five Year Maintenance Agreement

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AGREEMENT

REGARDING PROPOSED ACTIVITIES SUBJECT TO CALIFORNIA FISH AND GAME CODE SECTIONS 1600/1606

1 **WHEREAS:**

2 1. Mr. Douglas T. Cole, of Somes Bar, California, representing the
3 property owner, Marble Mountain Ranch, of Somes Bar (jointly referred to
4 as "OPERATOR"), on January 21, 1999 notified (99-0040) the DEPARTMENT of
5 Fish and Game (the DEPARTMENT) of the intent to divert or obstruct the
6 natural flow of, or change the bed or banks of, or use materials from
7 Stanshaw Creek, Siskiyou County, a water over which the DEPARTMENT
8 asserts jurisdiction pursuant to Division 2, Chapter 6 of the California
9 Fish and Game Code.

10 2. Fish and Game Code Sections 1600 et seq. make provisions for the
11 negotiation of agreements regarding the delineation and definition of
12 appropriate activities, project modifications and/or specific measures
13 necessary to protect fish and wildlife resources.

14 3. The DEPARTMENT has determined that without the mitigative features
15 identified in this agreement, the activities proposed in the OPERATOR's
16 notification could substantially adversely affect fish and wildlife. The
17 DEPARTMENT's representative, Ron Presley, inspected the site on February
18 16, 1999 and has determined that resident trout and aquatic
19 invertebrates would be the wildlife potentially affected by this project
20 due to loss of stream habitat due to lower flows.

21 **NOW THEREFORE, IT IS AGREED THAT:**

22 1. If this agreement is found to be in conflict with any other provision
23 of law or general conditions of public safety, it is void.

24 2. This agreement does not constitute or imply the approval or
25 endorsement of a project, or of specific project features, by the
26 DEPARTMENT of Fish and Game, beyond the DEPARTMENT's limited scope of
27 responsibility, established by Code Sections 1600 et seq. This
28 agreement does not therefore assure concurrence by the DEPARTMENT with
29 the issuance of permits from this or any other agency. Independent
30 review and recommendations will be provided by the DEPARTMENT as
31 appropriate on those projects where local, state, or federal permits or
32 environmental reports are required. This includes but is not limited to
33 CEQA and NEPA project review. Any fish and wildlife protective or
34 mitigative features that are adopted by a CEQA or NEPA lead agency or
35 made the conditions for the issuance of a permit, for this project,
36 become part of the project description for which this agreement is
37 written.

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3 3. If the project could result in the "take" of a state listed rare,
4 threatened or endangered species, OPERATOR has the responsibility to
5 obtain from the DEPARTMENT, a California Endangered Species Act Permit
6 (CESA 2081 Permit). The DEPARTMENT may formulate a management plan that
7 will avoid or mitigate take. Pursuant to Fish and Game Code Section
8 2090, a State lead agency shall consult with the DEPARTMENT to ensure
9 that projects will not jeopardize the continued existence of any listed
10 species. If appropriate, contact the DEPARTMENT CESA coordinator at
11 (530) 225-2300.

12 4. To the extent that the provisions of this agreement provide for
13 activities that require OPERATOR to trespass on another owner's
14 property, they are agreed to with the understanding that OPERATOR
15 possesses the legal right to so trespass. In the absence of such right,
16 the agreement is void.

17 5. To the extent that the provisions of this agreement provide for
18 activities that are subject to the authority of other public agencies,
19 such as county use permits, said activities are agreed to with the
20 understanding that all appropriate permits and authorizations will be
21 obtained prior to commencing agreed activities.

22 6. All provisions of this agreement remain in force throughout the term
23 of the agreement. Any provision of the agreement may be amended at any
24 time provided such amendment is agreed to in writing by both parties.
25 Mutually approved amendments become part of the original agreement and
26 are subject to all previously negotiated provisions. Title 14,
27 California Code of Regulations, Section 699.5(g) requires the OPERATOR
28 to submit the sum equal to 50% of the fee of the existing agreement to
29 amend an existing agreement.

30 7. The OPERATOR shall provide a copy of this agreement to all project
31 contractors, subcontractors, agents, employees, and project supervisors.
32 Copies of the agreement must be available at work sites during all
33 periods of active work and must be presented to DEPARTMENT personnel
34 upon demand until the project and/or monitoring period(s) are completed.

35 8. OPERATOR, contractor, or subcontractor are jointly and severely
36 liable for compliance with the provisions of this agreement. Upon the
37 DEPARTMENT'S determination of a violation of the terms of this
38 Agreement, this Agreement shall be suspended or canceled, at the
39 discretion of the DEPARTMENT and all activity must immediately stop
40 until another agreement is made. Failure to comply with the provisions
41 and requirements of this agreement and with other pertinent Code
42 Sections including but not limited to Fish and Game Code Sections 5650,
43 5652, 5937, and 5948, may result in prosecution.

44 9. OPERATOR agrees to provide the DEPARTMENT access to the project site
45 at any time, to ensure compliance with the terms, conditions, and
46 provisions of this agreement.

47 10. It is understood that the DEPARTMENT enters into this agreement for
48 purposes of establishing protective features for fish and wildlife, in
49 the event that a project is implemented. The decision to proceed with

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3 the project is the sole responsibility of OPERATOR, and is not required
4 by this agreement. It is agreed that all liability and/or incurred
5 costs related to or arising out of OPERATOR's project and the fish and
6 wildlife protective conditions of this agreement, remain the sole
7 responsibility of OPERATOR. OPERATOR agrees to hold harmless and defend
8 the State of California and the DEPARTMENT of Fish and Game against any
9 related claim made by any party or parties for personal injury or other
10 damage.

11 11. OPERATOR assumes responsibility for the restoration of any fish and
12 wildlife habitat which may be impaired or damaged either directly or,
13 incidental to the project, as a result of failure to properly implement
14 or complete the mitigative features of this agreement, or from
15 activities which were not included in OPERATOR's notification.

16 12. The DEPARTMENT shall have continuing jurisdiction over the project
17 site until all restoration of the site is complete.

18 13. The notification, project descriptions, all photos, and drawings
19 submitted with the notification shall become part of this agreement, to
20 define the scope of the proposed project. All work shall be done
21 according to plans submitted to and approved by the DEPARTMENT. The
22 OPERATOR shall notify the DEPARTMENT in writing of any modifications
23 made to the project plans submitted to the DEPARTMENT. Any modification
24 to the plans requires an amendment to this agreement. Changes to the
25 original plans done voluntarily may result in the DEPARTMENT suspending
26 or canceling this agreement. The OPERATOR must then submit a new
27 notification.

28 14. The following provisions including any additional project features
29 resulting from the above, constitute the limit of activities agreed to
30 and resolved by this agreement. The signing of this agreement does not
31 imply that OPERATOR is precluded from doing other activities, at the
32 site. However, activities not specifically agreed to and resolved by
33 this agreement are subject to separate notification pursuant to Section
34 1601/03.

35 15. The OPERATOR shall notify the DEPARTMENT of the dates of
36 commencement and completion of operations, three days prior to such
37 commencement or completion, by telephone message to (530) 841-2557.

38 16. To the extent that the provisions of this agreement provide for the
39 diversion of water, they are agreed to with the understanding that
40 OPERATOR possesses the legal right to so divert such water. In the
41 absence of such right, the agreement is void.

42 FEDERAL JURISDICTION

43 The US Army Corps of Engineers (Corps) has permitting requirements
44 for certain instream projects under Section 404 of the Federal Clean
45 Water Act. If this project exceeds one acre of disturbance within the
46 ordinary high-water mark of the stream and/or the stream's average

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3 annual flow exceeds five cubic feet per second, a permit may be required
4 by the Corps. A Corps permit may also be required for the installation
5 of rip rap that exceeds 500 linear feet at or over one cubic yard of
6 material per linear foot. If there is any question regarding the
7 possibility of your project meeting the above limitations, you should
8 contact the Corps prior to beginning work. This Agreement in no way
9 represents permitting requirements by the Corps. It is OPERATOR'S
10 responsibility to contact the U.S. Army Corps of Engineers, and to
11 comply with the provisions any 404 Permit issued, if required by the
12 Corps.

13 For information, contact the US Army Corps of Engineers office in
14 your area: San Francisco District, Eureka Office (707)443-0855.

15
16 OPERATOR may have certain other responsibilities pursuant to the
17 Federal Endangered Species Act resulting in mitigative project features
18 required by the U.S. Fish and Wildlife Service or National Marine
19 Fisheries Service.

20 **PROVISIONS**

21 Agreed work includes activities associated with the diversion of
22 flows from Stanshaw Creek for irrigation, recreation, domestic, and
23 small hydro-electric use. Construction includes the annual construction
24 of a rock diversion dam (by hand) to entrain flows into the diversion
25 ditch, and maintenance of a culvert/flume crossing on an unnamed
26 ephemeral tributary to Stanshaw Creek. The project area is located in
27 Siskiyou County (SW 1/4 of NE 1/4 of S 33, T 13 N, R 6 E) on property
28 administered by the U.S. Forest Service. The diversion structure existed
29 prior to this agreement.

30 **EQUIPMENT AND ACCESS**

31 Vehicles shall not be driven or equipment operated in water covered
32 portions of a stream, or where wetland vegetation, riparian vegetation,
33 or aquatic organisms may be destroyed. Except as otherwise provided for
34 in the Agreement, all work shall be performed by hand/hand tools.

35 Access to the work site shall be via existing trails.

36 **WATER DIVERSION/STRUCTURES**

37 This Agreement does not authorize the construction of any temporary
38 or permanent dam, structure, flow restriction or fill except as
39 described in OPERATOR'S notification.

40 An adequate fish passage facility shall be incorporated into any
41 barrier that obstructs fish passage.

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3 Except as otherwise specified in this Agreement, fill material for
4 the annual diversion dam shall consist of only native, clean rock which
5 will cause little or no siltation. If tarps, sand bags, or plastic
6 sheeting are used to seal the diversion structure, the tarps, bags,
7 and/or sheeting shall be removed before high seasonal flows return to
8 prevent littering of the stream.

9 When any dam or artificial obstruction is being constructed,
10 maintained, or placed in operation in the stream bed, flows to
11 downstream reaches shall be allowed to pass downstream to maintain
12 wildlife, plant life, and aquatic life below the dam in a healthy
13 condition, and to allow fish migration, during all times that the
14 natural stream flow would have supported aquatic life, pursuant to Fish
15 and Game Code section 5937 and 5901.

16 Structures and associated materials not designed to withstand high
17 seasonal flows shall be removed to areas above the normal high-water
18 mark before the return of such seasonal flows.

19 No excavation in the live stream is allowed. "Live stream" shall
20 be defined as that portion of the stream bed where flowing water is
21 present or anticipated during the term of this agreement.

22 In ephemeral streams, all construction will be done while the work
23 site is dry. Excavated material shall be placed outside the stream's
24 normal high-water mark.

25 A culvert exists in the intersection of the diversion flume/ditch
26 and an ephemeral stream. The culvert shall be maintained so as to resist
27 washout. The up stream and down stream fill slopes shall feature rock
28 slope protection (RSP) from the toe to the top of the fill. A fail soft
29 dip shall be maintained where the fill meets original ground to allow
30 topping flows to remain within the ephemeral stream channel. Rock
31 dissipators shall be placed at the culvert outlet to prevent channel
32 bed/bank scour. Upon the next occasion when the culvert washes out, the
33 pipe alignment shall be corrected to remove the skew (It should be
34 straight within the channel rather than pointing at the bank.).

35 **WATER QUALITY**

36 **EROSION, TURBIDITY, AND SILTATION**

37 Mud, silt, or other pollutants from diversion maintenance or other
38 project-related activities shall not be discharged into the flowing
39 stream or be placed in locations where it may be washed into the stream
40 by high flows or precipitation.

41 Silty/turbid water shall not be discharged into the stream. Such
42 water shall be settled, filtered, or otherwise treated prior to
43 discharge back into the stream channel.

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3 The OPERATOR shall install adequate control devices to ensure that
4 turbidity or siltation resulting from the project related activities
5 does not constitute a threat to aquatic life.

6 Erosion control measures shall be utilized throughout all phases
7 of operation where sediment runoff from exposed slopes threatens to
8 enter waters of the State. At no time shall silt laden runoff be
9 allowed to enter the stream or directed to where it may enter the
10 stream.

11 Upon DEPARTMENT determination that turbidity/siltation levels
12 resulting from project related activities constitute a threat to
13 aquatic life, activities associated with the turbidity/siltation shall
14 be halted until effective DEPARTMENT approved control devices are
15 installed, or abatement procedures are initiated.

16 CHANNEL RESTORATION

17 FILL AND SPOIL

18 Rock, gravel, and/or other materials shall not be imported to,
19 taken from or moved within the bed or banks of the stream except as
20 otherwise addressed in this Agreement.

21 Fill length, width, and height dimensions shall not exceed those
22 of the original diversion dam installation.

23 Fill shall be limited to the minimal amount necessary to
24 accomplish the agreed activities. Except as otherwise specified in
25 this Agreement, fill construction materials shall consist of native,
26 clean, silt-free gravel or river rock.

27 No fill material, other than clean river rock/gravel, shall be
28 allowed to enter the live stream.

29 No castings or spoil from the trenching or ditch cleaning
30 operations shall be placed on the stream side of the ditch where it may
31 be washed by rainfall into the stream.

32 The OPERATOR shall have readily available plastic sheeting or
33 visquine and will cover exposed spoil piles and exposed areas to
34 prevent these areas from losing loose soil into the stream. These
35 covering materials shall be applied when it is evident rainy conditions
36 threaten to erode loose soils into the stream.

37 CHANNEL BED STABILIZATION

38 If a stream channel has been altered during the operations, its
39 low flow channel shall be returned as nearly as possible to pre-project
0 conditions without creating a possible future bank erosion problem or a
1 flat wide channel or sluice-like area. The gradient of the stream bed
2 shall be returned to pre-project grade.

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2 - Page 7 of 7

3 BANK STABILIZATION

4 Areas of disturbed soils which slope toward a stream, shall be
5 stabilized to reduce erosion potential. The OPERATOR shall plant
6 seed, and heavily mulch all soils disturbed by the project prior to the
7 return of seasonal rains. The OPERATOR shall consult with the U.S.
8 Forest Service and use the U.S. Forest Service recommended plants,
9 seeds, and mulch.

10 Where suitable vegetation cannot reasonably be expected to become
11 established, rock slope protection (RSP) materials that will resist
12 wash out shall be used for such stabilization. The bank stabilization
13 material shall extend above the normal high-water mark. Any
14 installation of RSP materials not described in the original project
15 description shall be coordinated with the DEPARTMENT. Coordination may
16 include the negotiation of additional Agreement provisions for this
17 activity.

18
19 VEGETATION

20 Disturbance or removal of vegetation shall not exceed the minimum
21 necessary to complete the authorized operations. The disturbed
22 portions of any stream channel within the high water mark of the stream
23 shall be restored to their original condition under the direction of
24 the DEPARTMENT.

25 CLEAN-UP

26 Structures and associated materials not designed to withstand high
27 water flows shall be moved to areas above high water before such flows
28 occur.

29 Any materials placed in seasonally dry portions of a stream that
30 could be washed downstream or could be deleterious to aquatic life,
31 wildlife, or riparian habitat shall be removed from the project site
32 prior to inundation by high flows.

33 CONCURRENCE

34 Douglas T. Cole 4/28/99
35 (signature) (date)

36 Douglas T. Cole
37 Marble Mountain Ranch
38 OPERATOR

9 Charles Konval
0 Ron Presley (date)
1 California DEPARTMENT of Fish and Game

608 R. Presley
4/30/99

1 PETER F. KNOLL
2 DISTRICT ATTORNEY
3 Lawrence R. Allen (State Bar No.94773)
4 Deputy District Attorney
5 Courthouse, 311 4th Street
6 Yreka, California 96001
7 Telephone: (530) 842-8125

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SISKIYOU

OCT - 6 2000

Endorsed - T. Blackwell
DEPUTY CLERK

8 ATTORNEYS FOR PLAINTIFF

9 THE SUPERIOR COURT OF THE
10 STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SISKIYOU

11 THE PEOPLE OF THE STATE)
12 OF CALIFORNIA,)
13 Plaintiff,)

CASE NO. SC CV CV '00 - 1700

14 v.)

15 MEMORANDUM OF POINTS AND)
16 AUTHORITIES IN SUPPORT OF)
17 EX PARTE APPLICATION FOR)
18 TEMPORARY RESTRAINING ORDER)
19 AND ORDER TO SHOW CAUSE RE)
20 PRELIMINARY INJUNCTION,)
21 DECLARATION OF BRIAN BOYD.)

22 MORGAN TAYLOR COLE,)
23 MOUNTAIN RANCH,)
24 and DOES 1 through 50,)

25 Defendants.)

DATE:
TIME:
DEPT:

26 I. STATEMENT OF THE CASE

27 This is an environmental prosecution lawsuit brought by the Office of the District Attorney
28 pursuant to Fish and Game Code section 1603.1.

Defendants Morgan Taylor Cole owns and operates Mountain Ranch. Mountain Ranch is a
business where visitors can rent cabins, use RV hookups, and go on guided trips of the area under
defendant's direction.

In January 1999, defendant entered into a stream diversion agreement with the Department of
Fish and Game. That agreement is attached as exhibit A to the complaint that has been filed with
this action. These are referred to as "1603 agreements" in reference to Section 1600 *et. sep.* of

1 the Fish and Game Code dealing with stream diversions. In that agreement, at the bottom of
2 page 4, specific reference is made to diversions that impede the ability of fish to migrate around
3 the diversion. Specifically defendant is required to construct his diversion in such a manner as to
4 allow the passage of fish, or he must build a fish ladder. The complete blockage of a stream is
5 also a direct violation of Section 5901 which prohibits devices in streams which impede the
6 passage of fish.

7 On September 2, 2000, Warden Brian Boyd examined the area of the diversion. Warden
8 Boyd found a blockage that was not allowing the passage of fish. Indeed, the only water passing
9 the diversion was that which percolated under the rocks. Defendant was warned and asked to
10 remove the blockage to the extent fish could pass. Defendant has failed and refuses to comply
11 with the diversion agreement, and Section 5901 in allowing enough water for fish passage. This
12 is particularly important at this time of year due to low water flows and migratory patterns of
13 fish.

14 Quite simply, Plaintiff is requesting an order from this court that allows the Department of
15 Fish and Game to remedy this situation by removing enough of the obstruction to allow water
16 and fish to pass.

17 The First Cause of Action alleges that the Defendant has commenced activities which have
18 substantially diverted or obstructed the natural flow, or have substantially changed the bed,
19 channel, or bank of a stream, river or lake, or used materials from the streambeds without first
20 notifying the Department of Fish and Game, or prior to the Department of Fish and Game's
21 determining that the activities will not substantially adversely affect an existing fish or wildlife
22 resource.

23 The Second Cause of Action alleges that the Defendant has deposited in, permitted to pass
24 into, or placed where it can pass into the waters of this state substances or material deleterious to
25 fish, plant life, or bird life.

26 The Third Cause of Action alleges that the Defendants have committed an unfair business
27

1 practice in violation of Section 17200 of the California Business and Professions Code.

2
3
4 **II THE DISTRICT ATTORNEY IS AUTHORIZED BY EXPRESS**
5 **STATUTORY PROVISIONS TO OBTAIN RESTRAINING ORDERS**
6 **RELATING TO VIOLATIONS OF THE FISH AND GAME CODE.**

7 Fish and Game Code section 1603.1 authorizes the District Attorney to bring a civil action on
8 behalf of the People of the State of California.. Subdivision (e) also provides that a temporary
9 restraining order, or other injunctive relief may be obtained without the necessity of alleging or
10 proving at any state of the proceeding irreparable damage, or that the remedy at law is
11 inadequate.

12 The District Attorney has the authority from both the statutory and common law of the State
13 of California to investigate and secure injunctions relating to the matters involved in the instant
14 case without alleging or proving irreparable injury. *Porter v. Fiske* (1946) 74 Cal.App.2d 332;
15 *Paul v. Wadler* (1962) 209 Cal.App.2d 615. In *Porter v. Fiske*, the court stated:

16 "It was not necessary for respondent to allege or prove the existence of the usual
17 equitable grounds of the issuance of an injunction nor to allege a threatened
18 repetition of the acts. Where an injunction is authorized by statute, it is enough
19 that the statutory conditions are satisfied...Appellant cannot complain of an
20 injunction restraining her from violating the law."

21 Where the legislative body has specifically authorized injunctive relief against the violation
22 of such a law, it has already determined as a matter of law that irreparable injury attends to the
23 violation of the statute, and that injunctive relief may be the most appropriate way to protect
24 against the injury. *Paul v. Wadler, supra*, 209 Cal.App.2d 615, 625. Therefore, the only showing
25 that Plaintiff is required to make is that a danger exists that such conduct, prohibited and
26 enjoined by a specified statute, will occur in the future because the determination that
27 irreparable injury will occur if the conduct continues to occur has been already made by the
28 California Legislature.

Any claims by Defendant that they have or will discontinue these violations should not be

1 considered by the court. Where a discontinued practice could be resumed, the prior practice may
2 be the subject of a cease and desist order. *Beneficial Corporation v. F.T.C.* (3rd Cir., 1976) 542
3 F.2d 611, 617, citing to *Feil v. FTC* (9th Cir., 1960) 285 F.2d 897, 886 n. 15. Courts must beware
4 of efforts to defeat injunctive relief by protestations of repentance and reform. *United States v.*
5 *Oregon State Medical Society* (1952) 343 U.S. 326, 333.

7 III. BOND IS NOT REQUIRED.

8 California Code of Civil Procedure section 995.20 specifies:

9 “Bond in action or proceeding; public entities not required to give

10 “Notwithstanding any other statute, if a statute provides for a bond in an action or
11 proceeding, *including but not limited to a bond for the issuance of a restraining order or*
12 *injunction*, appointment of a receiver, or stay of enforcement of a judgment on appeal, the
following public entities are not required to give the bond and shall have the same rights,
remedies, and benefits as if the bond were given:

13 “(a) The State of California, or *the people of the state*, a state agency, department, division
14 commission, board, or other entity of the state, or a state officer in an official capacity or on
behalf of the state.

15 “(b) A county, city or district, or public authority, public agency, or other political
16 subdivision in the state, or an officer of the local public entity in an official capacity or on
behalf of the local public entity.

17 “(c) the United States or an instrumentality or agency of the United States, or a federal officer
18 in an official capacity of the United States or instrumentality or agency.”

19 (Emphasis added.)

20 Thus, by the plan terms of the statute, bond is not required of the people in the instant case.

21 (See also *City of San Francisco v. Cypress Lawn Cemetery* (1992) 11 Cal.App.4th 916, 14
22 Cal.Rptr.2d 323 – Governmental entities are granted exemption from undertaking requirement
23 ordinarily imposed upon private parties, and applies even where undertaking is required by
24 statute.)

25 Code of Civil Procedure section 529(b) relates specifically to undertakings required for
26 injunctive relief, and specifies that the undertaking requirement does not apply to:

27 “(3) A public entity or officer described in Section 995.220.”

1 Which, as noted above, includes actions brought on behalf of the People.

2
3 **IV. CONCLUSION**

4 Defendant has engaged, and continues to engage in conduct which violates the law.
5 Compliance with the environmental provisions is absolutely necessary to protect the public
6 interest and the welfare of fish, wildlife and the environment. Defendant is aware of these
7 violations. The Department of Fish and Game notified Defendant of the violations and asked
8 Defendant to cease such violations. Accordingly, the court is respectfully urged to grant
9 Plaintiff's motions for a Temporary Restraining Order and Order to Show Cause Re: Preliminary
10 Injunction.

11
12 Respectfully submitted,

13
14
15 **PETER F. KNOLL**
16 **DISTRICT ATTORNEY**

17
18 **DATED:** _____

19 *Lawrence R. Allen*
20 **LAWRENCE R. ALLEN**
21 **DEPUTY DISTRICT ATTORNEY**

22 **DECLARATION OF BRIAN BOYD**

23 I, BRIAN BOYD, declare:

24 That I am a game Warden with the California Department of Fish and Game. Attached
25 hereto as exhibit E is a portion of an affidavit for search warrant which outlines my background
26 training and experience as a warden. I am currently one of the resident wardens in the Happy
27 Camp area in northwestern part of Siskiyou County. I have been so assigned for approximately
28 two (2) years and I am familiar with the streams and out lying areas of my district.

1 That I am personally familiar with Stanshaw Creek. This is a stream which is a tributary to
2 the Klamath River, which is well known as a prime salmon and steelhead spawning stream.
3 Stanshaw Creek has a significant population of native trout. At the downstream end of
4 Stanshaw, close to the Klamath River, pools form which serve as cold-water refuges for the coho
5 and salmon on the migration up the Klamath River. At this time of year water flows are
6 particularly low due to a rather dry summer, as well as the natural aspects of river flows at this
7 time of year.

8 That on September 3, 2000, I responded to a private property owner complaint that all of the
9 water of Stanshaw Creek was being diverted, and that the diversion structure was so large as to
10 prevent fish from proceeding around the diversion. I went to the area, and found a rock diversion
11 that was approximately three and a half feet tall leaving no possibility of any fish to jump or go
12 around the dam. I found small trout fry below the dam and in the diverted channel. I contacted
13 defendant, Douglas Cole, to discuss the diversion. Cole admitted placing the diversion in the
14 manner that it was situated, and he claim he had a legal right to use the water. I checked the
15 diversion permit, (exhibit A to the complaint) and discovered that Cole did not have the right to
16 create a diversion that prohibited or impeded fish passage. I advised defendant that he was in
17 violation of his agreement, and he was also in violation of Sections 1603 and 5901 of the Fish
18 and Game Code. I have been subsequently advised that defendant has not, to this day, removed
19 the obstruction.

20 That at the site on September 3rd, I took photographs which are attached to this declaration.
21 These photos are true and accurate depictions of the events shown in the photos. Exhibit A ,
22 picture 1 is taken from top of the rock diversion. The rocks in the bottom center of the photo are
23 the diversion itself, while the water flowing is that flowing into the diversion ditch. Picture A-2
24 is looking downstream and depicts the water beneath the diversion. The only water passing the
25 diversion is percolating through the rocks into the small pond depicted in A-2. Exhibit B-1 is
26 downstream of the diversion showing the natural flow of the river. B-2 is from the top of the
27

1 diversion depicting the diversion ditch and the strong flow of water in the ditch. Exhibit C-1 is
2 upstream of the diversion, looking at the diversion. To the right of the photo is the natural stream
3 bed which has no water in it at all. To the left and center (where people are standing) is the
4 diversion ditch and flow. C-2 is downstream from the diversion looking back, and up toward the
5 diversion. This depicts the water percolating under the rocks into the natural stream bed. Exhibit
6 D is essentially the same photo as B-1 which shows that the only water through the diversion is
7 that which is percolating under the rocks.

8 That based on my training and experience, this diversion is completely diverting Stanshaw
9 Creek, and is completely blocking the stream. It is impossible for any fish to bypass this
10 obstruction, and the only water bypassing the obstruction is that which is managing to percolate
11 through. The obstruction is causing the refuge pools at the end of the Creek to become so
12 depleted that the coho and salmon will not be able to use these pools in their migration.

13 That I declare under penalty of perjury that the foregoing is true and correct. Executed this
14 6th day of October 2000, at Yreka, California.

15
16 BRIAN BOYD
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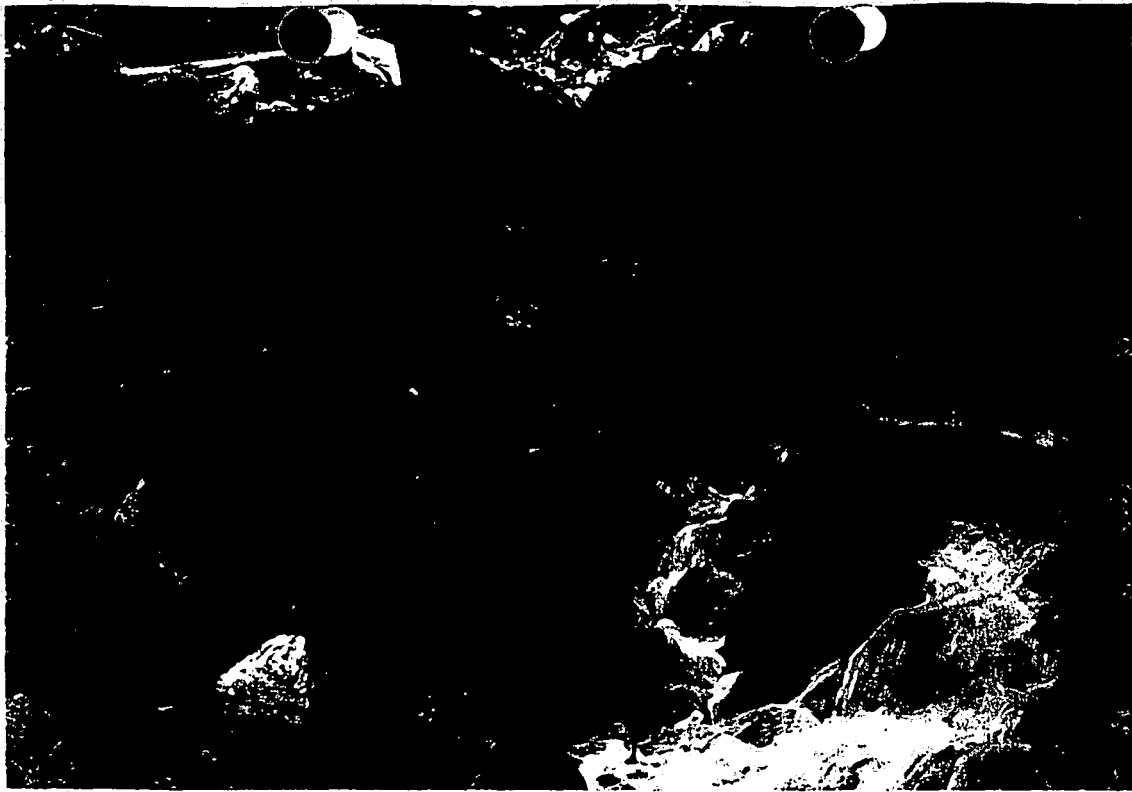
WR-44

2



Exhibit A

001946



WR-44
①



②

Exhibit B

001947

①



②



Exhibit C



- Same photo
as 2-1
Shows only water
through dam is
what is percolating
underneath.

Exhibit D

AFFIDAVIT FOR SEARCH WARRANT

Your affiant, Brian S. Boyd, is a Fish and Game Warden for the State of California. As such he is a duly appointed Peace Officer under the authority of Penal Code Section 830.2 and Fish and Game Code Section 856. Warden Boyd has been so employed as Fish and Game Warden since July 31, 1999. In addition to conducting several investigations during his course of employment, Warden Boyd has assisted in serving three search warrants and has conducted two court ordered probation searches in his employment as a State Game Warden.

Warden Boyd recently graduated from the Fish and Game Academy in Napa California ranked second in a class of thirty. Warden Boyd graduated from Humboldt State University with a B.S. degree in Wildlife Management in May of 1997 with an overall G.P.A. of 3.41. Warden Boyd graduated from Shasta Community College in Redding with an A.A. in General Education focusing in the Administration of Justice with academic honors. Warden Boyd has been employed in the past as a Wildlife Biologist for three years working on the inventory, management, and protection of both endangered, threatened, and sensitive species in Humboldt County. Warden Boyd has also overseen a stream monitoring program for a large lumber company in Humboldt County. This monitoring program included the identification of fish species present, sampling, and monitoring of streams spawning condition. Warden Boyd has a working knowledge in the identification of anadromous fish species and their habitats. Warden Boyd has a history of employment in the outdoors as evidenced by his past employment as a Logger, Ranch Hand, and Surveyor.

Warden Boyd has been an avid hunter and fisherman for over 18 years. Warden Boyd has 15 years of experience hunting big game in California, Idaho, Washington, and Nevada. Warden Boyd has taken numerous Black Bear, Mule Deer, and Blacktail Deer in various settings and conditions. Warden Boyd is very knowledgeable regarding the field and custom butchering of big game as well as the logistics of the processing, transportation, and storage of large quantities of wild meat. Warden Boyd has been an avid fisherman since childhood and has fished for trout, steelhead, chinook and coho salmon, as well as many other warm water fishes in many of the western states and pacific ocean under various condition and methods.

Exhibit E

1. PETER F. KNOLL
2. DISTRICT ATTORNEY
3. Lawrence R. Allen (State Bar No. 94773)
4. Deputy District Attorney
5. Siskiyou County Courthouse
6. 311 Fourth Street
7. Yreka, California 96097
8. Telephone: (530) 842-8125

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SISKIYOU

OCT - 6 2000

BY: Endorsed - T. Blackwell
DEPUTY CLERK

ATTORNEYS FOR PLAINTIFF

8 THE SUPERIOR COURT OF THE
9 STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SISKIYOU

11 THE PEOPLE OF THE STATE
12 OF CALIFORNIA,

13 Plaintiff,

14 v.

15 DOUGLAS TAYLOR COLE,
16 MARBLE MOUNTAIN RANCH,
17 and DOES 1 through 50.

Defendant.

CASE NO. SC CV '00 - 1700

TEMPORARY RESTRAINING
ORDER AND ORDER TO SHOW
CAUSE RE PRELIMINARY
INJUNCTION

DATE:
TIME:
DEPT:

19 To Defendants Douglas Taylor Cole, Marble Mountain Ranch, and DOES 1 through 50:

20 Based on the Ex Parte Application, the Memorandum of Points and Authorities, and the
21 declarations of Brian Boyd, it appears to the satisfaction of the Court that this is a proper case for
22 granting a Temporary Restraining Order. *Further, although not required by law to do so, the*
23 *Court finds that unless the Temporary Restraining Order prayed for by the People is granted,*
24 *great or irreparable harm will result to Plaintiff before the matter can be heard on notice.*

25 IT IS HEREBY ORDERED that the above-named Defendants, appear in this Court located at
26 311 Fourth Street, Yreka, California, on 11/6/00, at 100^{AM}, or as soon thereafter as the
27 matter may be heard why you and your agents, employees, and representatives should not be
28 restrained during the pendency of this action from engaging in, committing, or performing,

1 directly or indirectly, the following acts:

2 1. Engaging in certain acts in violation of Fish and Game Code section 1603, including but
3 not limited to the following:

4 A. Blocking or diverting Stanshaw Creek in any manner.

5 B. Commencing activities which have substantially diverted or obstructed the natural
6 flow, or have substantially changed the bed, channel, or bank of a river, stream, or
7 lake, or have used materials from the streambeds without first notifying the
8 Department of Fish and Game, or prior to the Department of Fish and Game's
9 determining that the activities will not substantially adversely affect an existing fish or
10 wildlife resource.

11 C. Depositing in, permitting to pass into, or placing where it can pass into the waters of
12 this state substances or material deleterious to fish, plant life, or bird life.

13 2.. Prohibiting access by means of locked gates, threats, or any other means of any Fish
14 and Game personnel including, but not limited to, wardens, biologists, engineers, environmental
15 specialists, or any other persons assisting the Department of Fish and Game in evaluating,
16 analyzing, conducting repair work, or taking whatever measures necessary to prevent further
17 destruction or degradation of Stanshaw Creek.

18 3. Prohibiting access of any person or equipment of the Department of Fish and Game,
19 or any person acting at their direction in removing any obstructions on Stanshaw Creek, which in
20 the discretion of the Department of Fish and Game is necessary to allow fish passage, water
21 passage, and any other activity necessary to sustain fish, plant or wildlife in, or around Stanshaw
22 Creek, or its tributaries.

23 IT IS FURTHER ORDERED that pending the hearing and determination of the Order to
24 Show Cause, the above-named Defendants and Defendants' agents, employees, and
25 representatives are hereby enjoined from engaging in or performing, directly or indirectly, the
26 acts listed above. Bond is not required of Plaintiff (CCP 995.220).

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IT IS FURTHER ORDERED that copies of the Summons and Complaint and this Order to Show Cause and Temporary Restraining Order and supporting documents be served on Defendants on or before 10/10/00. The Defendants must file and serve a response on or before 10/23/00. Any additional papers filed by the People must be filed on or before 10/30/00.

DATED: 10/6, 2000

ROGER T. KOSEL
JUDGE OF THE SUPERIOR COURT